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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: FHC Options, Inc.

File: B-246793.3

Date: April 14, 1992

John R. Alford, Jr., Esq., and Jonathan M. Joseph, Esq., Christian, Barton, Epps, Brent & Chappell, for the protester.
Joseph M. Goldstein, Esq., and Capt. Ralf Wilms, Esq., Department of the Air Force, for the agency.
Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The interpretation and enforcement of post-employment conflict-of-interest restrictions are primarily matters for the procuring agency and for the Department of Justice. The General Accounting Office's interest, in the context of a bid protest, is to determine whether any action of the former government employee may have resulted in prejudice for, or on behalf of, the awardee. The offeror's subcontractor's employment of a former government employee who participated in the initial development of the performance work statement and source selection plan (which was essentially disclosed in the solicitation), whose participation ended before the request for proposals was issued and who was neither involved in the preparation of the offeror's proposal nor would be involved in performing the contract, does not confer any unfair competitive advantage.

2. Although the contracting officer is permitted to directly determine a prospective subcontractor's responsibility when it is in the government's interest to do so, the Federal Acquisition Regulation does not require such determination; and where the agency has made an affirmative determination of an offeror's responsibility, General Accounting Office will not review that determination absent a showing of possible bad faith or fraud or misapplication of definitive responsibility criteria specified in the solicitation.

DECISION

FHC Options, Inc. protests the Air Force's award of a contract to Human Affairs International, Inc. (HAI) under request for proposals (RFP) No. F41689-90-R-0030, which was

issued by Brooks Air Force Base in Texas. The RFP was for the acquisition of outpatient child/adolescent psychiatric services at Brooks Army Medical Center, Fort Sam Houston, Texas, and inpatient adolescent psychiatric services at Wilford Hall Medical Center, Lackland Air Force Base, Texas. FHC protests that HAI should have been excluded from the competition because of a personal conflict of interest allegedly created by its subcontractor's employment of a retired procurement official who was previously involved with this procurement, and challenges the agency's affirmative determination of HAI's financial responsibility, arguing that the Air Force was required to investigate the financial responsibility of the subcontractor HAI proposed to perform most of the work under the contract. We deny the protest.

The requirement was synopsized in the Commerce Eusiness Daily in June 1990. The following month, the Air Force appointed a working group to develop the performance work statement for the RFP that would be issued, and the source selection plan (SSP) for the procurement, with Colonel Thomas Martin as the group's chairman. On August 16, Martin began the process of retiring from the Air Force, and on August 30, he informed the working group that he could no longer continue his involvement with the procurement or the group because he anticipated possible future employment with organizations that could be potential offerors under the procurement. On September 5, he made this announcement to the group in person. The record indicates that he had no further involvement with the procurement.

The RFP was issued on November 27, 1990, and was sent to 40 firms. As amended, the RFP set a closing date for receipt of initial proposals as February 4, 1991. The solicitation stated that the contract would be awarded to that firm offering the combination of technical excellence and total price considered the most advantageous to the government in accordance with the evaluation criteria set forth in the RFP, and advised that technical consideration would be more important than price in the overall evaluation. Eleven firms submitted proposals, which were evaluated by the source selection evaluation team. Discussions were conducted with those firms whose proposals were in the competitive range, which included FHC and HAI, and the RFP was amended several times before best and final offers (BAFOs) were due on September 6, 1991.

HAI's proposal stated that it intended to perform the administrative, management and external case management functions under the contract, and would subcontract the performance of the required clinical services to Laurel Ridge Alternative Services, Inc. and Laurel Ridge Care Units, Inc. On September 3, Martin began working part time

at Laurel Ridge Hospital, in addition to maintaining his private outpatient practice, having begun terminal leave from the Air Force on August 22. On October 1, Martin's retirement from the Air Force began.

The source selection evaluation team reviewed the BAFOs it had received, and a proposal analysis report was prepared. The report recommended award to HAI as the firm whose offer provided the best overall value to the government for both the inpatient and outpatient requirements. Before presenting this recommendation to the source selection authority, an internal investigation was conducted to determine whether Martin's association with HAI's subcontractor violated the procurement integrity provisions of the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. § 423 (Supp. I 1989), and required that HAI be disqualified from the competition. The Assistant Chief of Contract Law, who prepared the investigation report, concluded that the circumstances did not warrant disqualification. In his report, he pointed out that Martin's involvement with the procurement ended in August 1990, approximately 3 months before the RFP was issued. The report points out that because the acquisition extended over a relatively long period, during which time the Act was suspended and then amended, see 41 U.S.C. § 423 (Supp. I 1989), the rules concerning possible procurement integrity violations are not easily determined. Specifically, the original version of the Act did not provide for recusal from the procurement by the procurement official to permit the official to discuss future employment with a company competing for the contract. In the report, the specific facts and chronology of events are analyzed against the law applicable for each period of time. The Assistant Chief of Contract Law concludes that there was no violation of the Act, nor was there an appearance of impropriety warranting the disqualification of HAI. Regarding any potential conflict of interest based on insider information that Martin might have, the report notes that Martin's involvement was limited to the initial development of the performance work statement and the source selection plan, both of which were essentially disclosed to potential offerors in the RFP.

The contracting officer reviewed the report and issued a determination and findings confirming that Martin's employment with Laurel Ridge should not affect HAI's selection for award. The contracting officer also pointed out that no conflict of interest was evident because although Martin was working with Laurel Ridge, he would not participate in the firm's performance of the subcontract. An advisor to the source selection evaluation team also conducted a confidential inquiry regarding Martin's involvement with the procurement and his role with the potential

subcontractor. In a memo prepared for the record, the advisor noted that Martin spends half of his time maintaining his private outpatient practice and the remainder at the Laurel Ridge inpatient facility; that he would have no involvement in HAI's performance of this subcontract; that he had no awareness of the contents of HAI's or Laurel Ridge's proposals; that he had not had any involvement (such as off-duty employment) with Laurel Ridge prior to his association with them on September 3, 1991; and concluded that there was neither a procurement integrity violation nor any conflict of interest.

The source selection authority was briefed on the results of the investigation and the proposal analysis report, and concurred in the selection of HAI for award. The contract was awarded to HAI on November 14, 1991. FHC was debriefed on December 4. Based on allegations of a conflict of interest that it read in a newspaper on December 5, FHC filed this protest.

FHC protests that the award to HAI was improper because of "an apparent conflict of interest that was created by Laurel Ridge's employment of Thomas Martin at the time that HAI was submitting its best and final offer in response to the RFP." FHC points out that Martin had worked with several members of the source selection evaluation team while he was at Wilford Hall Medical Center, and that he had been chairman of the working group to develop the performance work statement, and argues that he had at least some degree of personal relationship with these procurement officials. In addition, FHC contends that Martin's involvement with the initial development of the performance work statement gave him "inside insight into exactly what was sought by the technical evaluation committee in prospective contractors." FHC also alleges a number of "irregularities" concerning, for example, whether or not Martin could, in fact, recuse himself from the procurement under the procurement integrity provisions in effect at the time of his involvement; his acceptance of employment while on terminal leave from the Air Force; and any potential financial gain he might personally realize from his relationship with Laurel Ridge.

Within the confines of a bid protest, our role is to determine whether any action of the former government employee may have resulted in prejudice for, or on behalf of, the awardee. Technology Concepts and Design, Inc., B-241727, Feb. 6, 1991, 91-1 CPD ¶ 132. The employment of a former government employee who is familiar with the type of work required but not privy to the contents of proposals or any other inside information does not confer an unfair competitive advantage. Id. The interpretation and enforcement of post-employment conflict-of-interest restrictions are primarily matters for the procuring agency and the

Department of Justice. See Central Texas College, B-245233.4, Jan. 29, 1992, 71 Comp. Gen. ___, 92-1 CPD ¶ 121. Furthermore, a contracting agency may not disqualify a firm from the competition for an appearance of impropriety or apparent conflict of interest where the agency has conducted an internal investigation that established that no wrongdoing actually occurred. See NES Gov't Servs., Inc.; Urgent Care, Inc., B-242358.4; B-242358.6, Oct. 4, 1991, 91-2 CPD ¶ 291.

Here, we do not find that the employment of Mr. Martin by the awardee's subcontractor, for the purpose of performing duties not directly related to the performance of the subcontract, conferred any unfair advantage on HAI. Because he terminated his involvement in the procurement at such an early stage he neither had inside access to (nor any opportunity to influence) the final version of source selection information; because his involvement ended long before any proposals had been submitted, no opportunity existed for him to influence the evaluation of proposals. Furthermore, since Laurel Ridge did not hire him to perform work under the subcontract, and HAI did not identify him in its proposal or otherwise give any indication of any involvement on his part, the evaluation team would have no reason to favor HAI's proposal based on his employment at Laurel Ridge. Therefore, the only consideration remaining is whether his participation in the early stages of the procurement provided him with inside knowledge which was disclosed to Laurel Ridge, conferring an unfair competitive advantage on HAI.

While Martin's actual participation in the procurement lasted from approximately June 1989, until he discontinued his involvement in August 1990, the agency report points out that only his participation from June until November 30, 1989, when he worked on the performance work statement (PWS) and source selection plan (SSP), was subject to the restrictions of the OFPP Act (as originally enacted), since the application of the statute was suspended from December 1, 1989, through November 30, 1990. The statute, neither as originally enacted nor as amended, applied during the suspension period.[1]

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[1]Under the OFPP Act (41 U.S.C. § 423(b) and (e), as originally enacted, and 41 U.S.C. § 423(b) and (f)), a procurement official is prohibited from knowingly, directly or indirectly, soliciting or accepting from or discussing with any officer, employee, representative of a competing contractor, future employment or a business opportunity. The amended Act permits the procurement official to recuse himself to permit future employment discussions. 41 U.S.C. § 423(c). The protester contends that Martin was, in fact,

Further, while participation in the drafting of the PWS and SSP confers the status of a procurement official under the Act, such participation by itself does not necessarily create a conflict of interest. As stated previously, the mere employment of an individual who is familiar with the type of work required and helped prepare the specification or statement of work, but who is not privy to the contents of proposals or other inside information, does not establish a conflict of interest or confer an unfair competitive advantage. See generally Damon Corp., B-232721, Feb. 3, 1989, 89-1 CPD ¶ 113. Neither the PWS nor the SSP was in its final form when Martin recused himself from the procurement. The PWS was disclosed in the RFP, and was also later revised by amendment. In this connection, the Air Force held preproposal conferences in December 1991 (after Martin's recusal from the procurement) to allow contractors to obtain clarification of any aspects of the RFP that they considered unclear; the 248 questions that were raised were then distributed, along with the agency's responses, to all offerors to assist them in the preparation of their offers. In these circumstances, we fail to see how any information Martin gained from his participation in the initial drafting of the PWS would create any competitive advantage over other offerors. Similarly, the final version of the SSP was not approved until after Martin resigned from the working group; thus, any inside information he retained about the source selection plan as it existed when he was involved would have been obsolete, or at least unreliable, by the time the RFP was issued.

While FHC argues that an appearance of impropriety is created by Martin's association with Laurel Ridge, we do not find any reasonable support for this claim in the record; moreover, the protester has not demonstrated any actual impropriety. A contracting agency may not disqualify a private contractor for a mere appearance of impropriety

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unable to recuse himself from the Act's prohibition because the formal procedures for such recusal were only included in the amended Act and thus Martin improperly discussed and accepted employment with Laurel Ridge. The agency's investigation notes that the key recusal eligibility requirement is that the procurement official not have participated personally and substantially in the evaluation of proposals, the selection of sources, or the conduct of negotiations, and concludes that Martin's participation meets the standard for recusal under the amended Act. We find this conclusion reasonable. We also agree with the agency that since Martin's resignation from the working group occurred while integrity provisions of the Act were suspended, he was not required to meet the requirements for recusal added when the statute was amended.

where there is evidence, such as an internal investigation, sufficient to convince a reasonable person that no impropriety actually occurred. See NES Gov't Servs., Inc.; Urgent Care, Inc., supra. Here, we find reasonable support in the record for the conclusions the agency reached in its investigation report. This portion of the protest is denied.

FHC also challenges the Air Force's affirmative determination of HAI's responsibility to perform the contract, contending that because the firm proposed to subcontract a substantial portion of the performance, the agency was required to separately assess Laurel Ridge's responsibility. FHC contends that Laurel Ridge is the subsidiary of a parent corporation currently in bankruptcy.

Contracting agencies generally do not directly review the responsibility of the subcontractors that an awardee may use; rather, it is incumbent upon the prime contractor to review the responsibility of its subcontractors to ensure their ability to comply with contract requirements. See Federal Acquisition Regulation (FAR) § 9.104-4(a); Adrian Supply Co., B-237531, Feb. 12, 1990, 90-1 CPD ¶ 182. Although the contracting officer is permitted to directly determine a prospective subcontractor's responsibility when it is in the government's interest to do so, the FAR does not require such determination. See FAR § 9.104-4(b).

The protester acknowledges that under our Bid Protest Regulations, we do not review a contracting agency's affirmative determination of responsibility absent a showing of possible fraud, bad faith, or misapplication of definitive responsibility criteria on the part of the contracting officials, see 4 C.F.R. § 21.3(m)(5) (1991); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177, but argues that "the contracting officer misapplied the definitive responsibility criteria in failing to evaluate the financial condition of the 98% subcontractor."

Definitive responsibility criteria are specific and objective standards, established by an agency for a particular procurement, for use in measuring a bidder's ability to perform the contract. These special standards limit the class of bidders to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance. Bender Shipbuilding & Repair Co., Inc., B-219629.2, Oct. 25, 1985, 85-2 CPD ¶ 462. An example of a definitive responsibility criterion would be a requirement that a bidder have installed, on at least two prior projects, elevators comparable to those being bought and which have worked satisfactorily for at least 1 year. Id. Here, FHC has cited no specific and objective standard

for measuring performance capability set forth in the RFP and thus has not shown any failure on the agency's part to apply a definitive responsibility criterion.[2]

FHC also argues that HAI's choice of Laurel Ridge as its subcontractor also creates a conflict of interest, because Laurel Ridge, as a local healthcare provider, allegedly would have the ability to refer any surplus of patients that could not be accommodated at the 20-bed Wilford Hall inpatient facility to its own hospital for treatment. However, the RFP PWS provided that if in-patient needs exceed available beds in the Wilford Hall facility, patients would be referred for admission to an appropriate facility through current Air Force Health Benefits Office procedures. Under the contract, the Air Force retained the patient referral authority in its health benefits office staff, rather than allowing the contractor to make the referral decisions.

The protest is denied.

for James F. Hinchman
General Counsel

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[2]We also point out that even where a contractor is in bankruptcy--putting aside the relevance of the financial status of a subcontractor's parent corporation (which corporation is not the offeror/contractor)--the mere fact of the bankruptcy does not require a finding of nonresponsibility. Lucas Place, Ltd., B-238008; B-238008.2, Apr. 18, 1990, 90-1 CPD ¶ 398.